TABLE OF CONTENTS

	Page
Jurisdictional Statement	1
Opinion Below	2
Jurisdiction	2
Question Presented	3
Statute Involved	3
Constitutional Provisions Involved	3
Statement of the Case	4
A. The Challenged Statute	4
B. The Proceedings Below	6
C. The District Court's Opinion	7
The Questions Are Substantial	12
Conclusion	18
Appendix A—Opinion of the District Court	1a
Appendix B—Judgment and Order of the District Court	24a
Appendix C—Notice of Appeal	26a
Appendix D—Salary Supplement Act	28a

TABLE OF AUTHORITIES

Cases:

Abington School Dist. v. *Schempp*, 374 U.S. 203 (1963) 10, 14

Board of Education v. *Allen*, 392 U.S. 236 (1968) 10-11, 13, 14-17

Everson v. *Board of Education*, 330 U.S. 1 (1947) ... 10, 13

Lemon v. *Kurtzman*, No. 89, 1970 Term 13, 14, 18

McGowan v. *Maryland*, 366 U.S. 420 (1961) 15

Tilton v. *Richardson*, No. 153, 1970 Term 11, 13-14, 18

Walz v. *Tax Commission*, 397 U.S. 664 (1970) 9-11, 14, 16-17

Page

STATUTES:

Title I of the Higher Education Facilities Act of 1963, 20 U.S.C. §§ 701-58 (1964) 11

R.I. Const. art. XII, § 1 4

R.I. Gen. Laws § 16-51 .....*passim*

R.I. Gen. Laws § 16-19-2 4

R.I. Gen. Laws § 16-22-2 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

WILLIAM P. ROBINSON, JR., Commissioner of Education of the State of Rhode Island, RAYMOND H. HAWKSLEY, General Treasurer of the State of Rhode Island, and CHARLES W. HILL, Controller of the State of Rhode Island, *Appellants*,

and

JOHN R. EARLEY, WILLIAM A. HANSON, MADELYN LAW, RALPH F. MCELROY, ALAN E. MOSS, FRANK J. SHEALEY, PHYLLIS A. WALTER, MARGARET-MARY CUMMISKEY, and CORNELIUS A. CUMMISKEY, *Intervenor-Appellants*,

v.

JOAN DICENSO, DONALD R. HILL, ANN CLANTON, ALICE CHASE, HELEN KING, and MARIE FRIEDEL, *Appellees*.

On Appeal From a Three-Judge United States District Court for the District of Rhode Island

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JURISDICTIONAL STATEMENT

Intervenor-appellants appeal from the judgment of the United States District Court for the District of Rhode Island, entered on June 17, 1970, declaring a Rhode Island statute providing supplements to the

salaries of nonpublic school teachers unconstitutional under the First Amendment and permanently enjoining further implementation of the statute. This Jurisdictional Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

OPINION BELOW

The opinions filed by the three-judge District Court for the District of Rhode Island have not yet been reported and are reprinted as Appendix A of this Jurisdictional Statement. Copies of the judgment entered by the District Court and of the notice of appeal filed with the District Court are reprinted as Appendices B and C.

JURISDICTION

This action, to enjoin the operation of a Rhode Island statute, was brought pursuant to 28 U.S.C. §§ 1331, 1343 and 2281 and was heard by a three-judge court under 28 U.S.C. § 2284. The judgment of the District Court was entered on June 17, 1970, and intervenor-appellants filed notice of appeal with the District Court on June 26, 1970. An application to stay the permanent injunction issued by the District Court was filed on June 26, 1970 with this Court and addressed to Mr. Justice Brennan, Circuit Justice for the First Circuit. The application was referred by Mr. Justice Brennan to the Court and, on June 27, 1970, the Court granted a stay of the District Court's order pending the timely filing of the appeal in this case.

The jurisdiction of this Court to review the judgment below by direct appeal is conferred by 28 U.S.C. § 1253.

QUESTION PRESENTED

The sole question presented by this appeal is whether the Rhode Island statute providing supplements to the salaries of nonpublic school teachers violates the Establishment Clause of the First Amendment, as applied to the states through the Fourteenth Amendment, because teachers in religiously affiliated schools are eligible for and receive benefits from the statute.

STATUTE INVOLVED

The Rhode Island statute challenged by appellees on First Amendment grounds is entitled "An Act Providing Salary Supplements to Nonpublic School Teachers," R.I. Gen. Laws chap. 16-51, and is hereinafter referred to as the Salary Supplement Act. The statute is reprinted as Appendix D to this Jurisdictional Statement.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citi-

zens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. The Challenged Statute

Rhode Island's Salary Supplement Act, which became effective on July 1, 1969, appropriates state funds for the payment of a 15 per cent supplement to the salaries of eligible teachers in nonpublic elementary schools in the state. The statute was enacted pursuant to the long-standing "policy of the state of Rhode Island to provide a quality education for all Rhode Island youth"[1] and for the express purpose of permitting nonpublic elementary schools "to provide salary scales which will enable them to retain and obtain teaching personnel who meet recognized standards of quality." R.I. Gen. Laws § 16-51-1. An eligible teacher is defined both by reference to the school in which he or she teaches and to his or her individual qualifications.

The statute defines "a nonpublic school" as one which is not operated for profit, which is capable of permitting its students to fulfill the requirements of Rhode Island's compulsory school attendance law,[2] and which has an annual per pupil expenditure for secular edu-

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[1] That policy has its roots in the Rhode Island Constitution, which imposes on the state legislature "the duty . . . to promote public schools *and* to adopt all means . . . necessary and proper to secure to the people the advantages of education." R.I. Const. art. XII, § 1 (emphasis added).

[2] R.I. Gen. Laws § 16-19-2; see also R.I. Gen. Laws § 16-22-2.

cation that does not equal or exceed the average annual per pupil expenditure in the state's public schools. R.I. Gen. Laws § 16-51-2. A teacher in a nonpublic elementary school satisfying that definition will be eligible for the salary supplement if he or she meets the additional qualifications imposed by section 3 of the statute. Briefly stated, those additional requirements are that a teacher teach only those subjects which are required to be taught by state law or which are taught in public schools, that the teacher be certified by the State Department of Education, that the teacher's salary meet the minimum salary requirements of the state law for public school teachers, that the teacher use only teaching materials in use in the public schools, and that the teacher not teach a course in religion while receiving a salary supplement from the state. R.I. Gen. Laws § 16-51-3.

The statute also limits participation in its benefits to those teachers whose total salaries, including the 15 per cent supplement, do not exceed the average maximum salary paid to public school teachers in the state. R.I. Gen. Laws § 16-51-4. Participating teachers must apply directly to the Commissioner of Education for the supplement, R.I. Gen. Laws § 16-51-3; the supplement must be paid directly to the teacher and "not through the agency of the nonpublic school in which the teacher is employed." R.I. Gen. Laws § 16-51-5. The State Department of Education is authorized to audit the books of nonpublic schools to assure that participating teachers are being paid at least the prescribed minimum salary. R.I. Gen. Laws § 16-51-5. For the first year of the statute's operation, the Rhode Island General Assembly appropriated $375,000 to implement it.

B. The Proceedings Below

The appellees, six individuals asserting the status of state taxpayers, filed a complaint with the United States District Court for the District of Rhode Island on December 16, 1969, challenging the constitutionality of the Salary Supplement Act under the Establishment and Free Exercise Clauses of the First Amendment, as made applicable to the states through the Due Process Clause of the Fourteenth Amendment. The essential constitutional defect alleged by the appellees was that the challenged statute "provides for direct financial aid out of state funds which support sectarian schools." Complaint, ¶ 20. The named defendants were the state officials responsible for implementing the statute. On February 11, 1970, the District Court granted a motion by seven teachers in Roman Catholic elementary schools, who had qualified for salary supplement payments, and two parents with children attending Roman Catholic elementary schools to intervene on behalf of the defendants.

A three-judge court was convened, as requested by the appellees in their complaint, and that court received evidence and heard arguments on March 18 and 19, 1970. The evidence consisted of several documents and depositions and the testimony of nine witnesses.[3] On June 15, 1970, after receiving post-trial briefs, the District Court filed its opinion holding that the Salary Supplement Act contravened the Establishment Clause

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[3] The witnesses who testified at trial were Edward F. Wilcox, who supervises the administration of the Salary Supplement Act; Rev. Edward W. K. Mullen, Superintendent of Schools for the Roman Catholic Diocese of Providence; and the seven teacher-intervenors. Appellees also placed in evidence the depositions of two other parochial school teachers who had qualified for salary supplement payments.

of the First Amendment. Judge Pettine entered a separate opinion, concurring in part and dissenting in part. On June 17, 1970, after denying applications for a stay of its injunction pending direct appeal to this Court, the District Court entered its judgment declaring the statute unconstitutional and permanently enjoining its operation. On June 26, 1970, an application was presented to Mr. Justice Brennan, Circuit Justice for the First Circuit, seeking a stay of the permanent injunction until this Court could consider and decide the appeal in this case. Mr. Justice Brennan referred the application to the entire Court and, on June 27, 1970, the Court granted the stay, with Mr. Justice Douglas dissenting and Mr. Justice White and Mr. Justice Marshall taking no part in the consideration of the application.

C. The District Court's Opinion

The District Court did not enter separate findings of fact and conclusions of law. Consequently, its opinion is the sole source of the facts it deemed relevant to the legal issues in the litigation.

The bulk of the evidence presented by the parties at trial reflected their differing views of the applicable legal principles. The appellees contend that the Establishment Clause bars all public financial assistance to religious or "sectarian" institutions, and their evidence emphasized the so-called religious "atmosphere" existing in church-related nonpublic schools which benefit from the Salary Supplement Act. The intervenor-appellants assert that the state can constitutionally subsidize the secular educational functions performed by church-related schools and emphasized in their evidence that teachers receiving salary supple-

ment payments were engaged in solely secular educational activities.[4] The facts recited in the District Court's opinion reflect those two divergent lines of evidence.

In enacting the Salary Supplement Act, the Rhode Island General Assembly found that 25 per cent of all elementary school children in the state attend nonpublic schools and that those schools, because of the rising costs of teachers' salaries, were having difficulty maintaining their educational quality. R.I. Gen. Laws § 16-51-1. The District Court found that the evidence presented at trial concerning Roman Catholic parochial elementary schools[5] fully corroborated those legislative findings. However, despite the legislature's concern for the financial difficulties faced by nonpublic schools, the District Court also found that the challenged statute would not relieve parishes which support parochial schools of their escalating financial burdens. Those parishes will continue to spend increasing amounts of their own funds in their quest for educational quality, and the Salary Supplement Act will simply permit parochial schools to obtain better qualified teachers.

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[4] Consistent with their view of the controlling constitutional principles, the intervenor-appellants objected to all evidence offered by the appellees to show a so-called "religious atmosphere" in parochial schools. The intervenor-appellants contended in the District Court that all such evidence is constitutionally irrelevant, a position they will continue to urge in this appeal.

[5] There are two explanations for the emphasis at trial and in the District Court's opinion on those nonpublic schools that are affiliated with the Roman Catholic Church. First, 95 per cent of all Rhode Island children enrolled in nonpublic schools attend Roman Catholic parochial schools. Secondly, to date, only teachers in Roman Catholic parochial schools have applied for benefits under the Salary Supplement Act.

The District Court noted that parochial schools "possess a number of distinctively religious attributes which distinguish them from public schools." App. A, p. 8a. Among those "religious attributes" are the proximity of parochial schools to the parish church, religious symbolism on and within the school building, classroom prayers, the teaching of religion as a part of the curriculum and certain other religiously oriented activities. The District Court also found a concern for religious values expressed in a Diocesan Handbook of School Regulations, which, subject to the requirements of state law and accreditation, provides general guidelines for parochial school principals. On the basis of those facts, the District Court concluded that the Roman Catholic Church "gains special advantage from a curriculum which contains both religious and secular subjects," App. A, p. 9a, and that "the diocesan school system is an integral part of the religious mission of the Catholic Church." App. A, p. 9a.[6]

The District Court also found, however, that the religious attributes of parochial schools and the concern of those schools for religious values "[do] not necessarily affect the content of secular subjects in diocesan schools." App. A, p. 8a. The District Court noted that all teachers who testified at trial stated that they did not inject religion into their secular courses and that "[t]his testimony gains added credibility

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[6] Strictly speaking, the conclusions quoted above from the District Court's opinion cannot be considered findings of fact, since no evidence was presented at trial to show why the Roman Catholic Church supports and maintains elementary schools or what role those schools play in the religious mission of the Roman Catholic Church. However, this Court has already indicated that those considerations are irrelevant to the question of whether the state can constitutionally spend its funds to aid the secular educational process in those schools. See *Walz* v. *Tax Commission*, 397 U.S. 664, 671 (1970).

from the fact that several of the teachers were non-Catholics." App. A, p. 8a. The District Court also pointed out that teachers qualifying for salary supplements were required to use only those teaching materials that are approved for use in the public schools.

The District Court's review of the evidence concluded with the following statement:

> "These determinations point to two ultimate facts. On the one hand, we find that the statute will have the significant if temporary secular effect of aiding the quality of secular education in Rhode Island's Roman Catholic elementary schools. On the other hand, we think it equally clear that the Act gives significant aid to a religious enterprise." App. A, p. 10a.

The District Court began its Establishment Clause analysis by purporting to apply the "purpose and primary effect" test first articulated by this Court in *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 222 (1963), and subsequently applied to the issue of public financial assistance to church-related education in *Board of Education* v. *Allen,* 392 U.S. 236, 243 (1968).[7]

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[7] The District Court quickly and correctly disposed of two legal arguments made by the appellees. First, the District Court ruled that the appellees' separate claim based on the Free Exercise Clause of the First Amendment failed for lack of proof. App. A, p. 11a. Secondly, the District Court rejected the appellees' Establishment Clause argument based on the following language from *Everson* v. *Board of Education,* 330 U.S. 1, 15-16 (1947):

> "The 'establishment of religion' clause of the First Amendment means at least this: . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."

Appellees contended that language imposed an absolute prohibition on all public aid to religious institutions. The District Court properly noted that any such reading of *Everson* was belied by its holding. See also *Walz* v. *Tax Commission,* 397 U.S. 664, 670-71 (1970).

This Court formulated that test in this manner:

> "The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." 392 U.S. at 243.

The District Court had little trouble holding that, in light of the Salary Supplement Act's express statement of purpose, R.I. Gen. Laws § 16-51-1, the challenged statute had the requisite secular purpose. However, the primary secular effect requirement of the *Allen* test caused the District Court greater problems.

Having found that the Salary Supplement Act had produced two significant effects, one clearly secular and the other characterized as religious, the District Court declined to engage in further analysis to determine which effect should be considered "primary" within the meaning of the *Allen* test.[8] Rather, the District Court read this Court's recent decision in *Walz* v. *Tax Commission,* 397 U.S. 664 (1970), as refining the *Allen* test of primary effect and directing the inquiry to whether the challenged spending program

[8] In so ruling, the District Court specifically rejected the intervenor-appellants' argument that the *Allen* decision requires that the primary effect be measured by reference to the educational function being subsidized by the public funds. Under that analysis, a challenged statute will have the necessary primary secular effect if funds appropriated under the statute support only the secular educational functions of religiously affiliated schools. A three-judge district court in Connecticut applied that precise test in sustaining the constitutionality of the Higher Education Facilities Act of 1963, 20 U.S.C. §§ 701-58, in the face of an Establishment Clause challenge. *Tilton* v. *Richardson,* No. 153, October Term, 1970.

results in "excessive entanglements" between the government and religious institutions. The District Court concluded that the Salary Supplement Act produced such excessive entanglements and therefore had an effect proscribed by the Establishment Clause. The District Court also expressed concern that efforts by church-related schools to qualify their teachers for salary supplement payments could limit the internal freedom of those schools to order their curricula.

In a separate opinion, Judge Pettine concurred with the majority's conclusion that the Salary Supplement Act would lead to excessive entanglement between government and religion. But he dissented from the majority's ruling that the statute had the effect of providing substantial support to a religious enterprise. Relying specifically on this Court's recognition in *Allen* that parochial schools perform the distinct functions of secular education and religious instruction, 392 U.S. at 245-48, Judge Pettine asserted that state support for the secular educational functions of parochial schools cannot be considered support for a religious enterprise unless there is proof that the secular teaching in those schools is permeated by religion. Judge Pettine found absolutely no proof of permeation in the record of this case.[9]

THE QUESTIONS ARE SUBSTANTIAL

1. The core constitutional question presented by this appeal is whether the Establishment Clause prohibits a state from seeking to improve the quality of secular education provided to a significant number of students

[9] Even the majority found no proof of such permeation. At most, the majority found a religious atmosphere existing in Rhode Island parochial schools. But it also was careful to point out that the so-called religious atmosphere did not affect the teaching of secular subjects in those schools. App. A, pp. 8a, 9a.

by religiously affiliated nonpublic schools. A similar constitutional question is already before this Court in two cases set for argument. In *Lemon* v. *Kurtzman*, No. 89, October Term, 1970, the appellants challenge on Establishment Clause grounds a Pennsylvania statute providing public funds to reimburse nonpublic elementary and secondary schools, including those with religious affiliations, for the cost of "secular educational services" provided in certain specified subjects. In *Tilton* v. *Richardson*, No. 153, October Term, 1970, a federal program of grants to public and private institutions of higher education, including those that are church-related, for the construction of academic facilities has been attacked on Establishment Clause grounds. In contrast to this case, the lower courts in both *Lemon* and *Tilton* found no merit in the Establishment Clause claims.

This Court's decision to hear the *Lemon* and *Tilton* cases indicates that it is ready to provide some needed clarification and guidance on the limitations the Establishment Clause imposes on government power to render financial assistance to church-related education. However, the aid program challenged in this case differs in several important respects from the programs attacked in *Lemon* and *Tilton*. For example, the public assistance provided by the Salary Supplement Act is paid directly to the teachers of secular subjects in nonpublic schools in Rhode Island, whereas the public funds at issue in the *Lemon* and *Tilton* cases are paid to church-related educational institutions.[10] In addi-

[10] It is quite probable that this Court will decide ultimately that such distinctions in the recipient of the public funds is without constitutional significance. However, in two prior decisions on this constitutional question, this Court has observed that, under the aid programs in question, no public funds went to church-related schools. *Board of Education* v. *Allen*, 392 U.S. 236, 243-44 (1968); *Everson* v. *Board of Education*, 330 U.S. 1, 18 (1947).

tion, although both this case and the *Lemon* case involve aid to lower levels of education, this case reaches the Court in a different procedural posture than the *Lemon* case. For these reasons, a decision in the *Lemon* and *Tilton* cases will not necessarily decide the constitutional question presented by this appeal. In addition, because of the differences between this case and the *Lemon* and *Tilton* cases, this Court's consideration of the constitutional questions presented by all three cases will gain an added dimension if this case is set for argument.

2. Apart from the fact that arguments will be heard this Term in the *Lemon* and *Tilton* cases, this appeal presents important and substantial questions concerning the scope and application of this Court's prior Establishment Clause decisions. The most serious questions raised by the District Court's opinion are its interpretation of the decision in *Board of Education* v. *Allen, supra,* and its efforts to reconcile *Allen* with the more recent decision in *Walz* v. *Tax Commission, supra.*

The *Allen* decision sustained, in the face of an Establishment Clause challenge, a New York statute which made free textbooks available to students in grades seven through twelve of public and private schools, including those with religious affiliations. That holding was predicated on the purpose and primary effect test first enunciated in *Abington School Dist.* v. *Schempp, supra.* In the course of the *Allen* opinion, the Court expressly acknowledged that "religious schools pursue two goals, religious instruction and secular education." 392 U.S. at 245; see also *id.* at 247-48. The New York textbook program was upheld because the challenged statute authorized local school boards to distribute only secular textbooks. See 392 U.S. at 244-45. In addi-

tion, although the *Allen* opinion does not recite any facts concerning the religious atmosphere or activities of parochial schools benefiting from the textbook program, it can be safely assumed that those schools did not differ markedly in their religious attributes from Rhode Island parochial schools.

The *Allen* decision, therefore, makes the secular-religious dichotomy in the curricula of parochial schools the focus for analyzing the primary effect of a statute challenged on Establishment Clause grounds. Such a statute will have the requisite primary secular effect if it subsidizes only the secular educational process in those schools. The District Court, however, summarily rejected that test of primary effect, labeling it as too "narrow" in its perspective and "unrealistic." App. A, p. 14a.[11] The District Court viewed the proven secular benefits of the Salary Supplement Act to be no more significant constitutionally than the fact that a "religious enterprise" benefited from the statute. But the *Allen* decision makes clear that the incidental benefits realized by religiously affiliated schools from challenged expenditures are constitutionally irrelevant if the statute produces the necessary primary secular effect. See also *McGowan* v. *Maryland*, 366 U.S. 420, 442-45 (1961).

The District Court also misconstrued the *Allen* decision when it declined to analyze the several effects produced by the Salary Supplement Act to determine which was "primary" for Establishment Clause pur-

[11] It is interesting to note that the District Court dismissed the *Allen* test of primary effect as "unrealistic" when "direct financial aid to denominational schools is at issue." App. A, p. 14a. The District Court apparently forgot that no such "direct" aid is involved in this case. The state funds at issue go directly to eligible nonpublic school teachers and not to the schools.

poses. See App. A, pp. 13a-14a. Any constitutional test predicated on the existence of a primary effect necessarily presupposes that the statute in question has generated several effects. It is the task of courts applying that test to analyze those several effects in light of the principles laid down in *Allen* and to identify the one effect which is primary for Establishment Clause purposes. The District Court, however, described as "significant" two of the effects generated by the Salary Supplement Act and then concluded that no useful purpose would be served by engaging in further analysis to determine which of those two effects was primary. As a consequence, the District Court substituted the label "significant" for constitutional analysis and abdicated the judicial function imposed on it by the *Allen* decision. Indeed, a careful reading of the District Court's primary effect analysis, App. A, pp. 13a-16a, indicates quite clearly that the lower court completely disregarded the purpose and primary effect test prescribed by this Court only two years ago in *Allen* for measuring the constitutional validity of public aid to church-related education.

Finally, the District Court's effort to reconcile the *Allen* test with the recent decision in *Walz* v. *Tax Commission, supra,* raises substantial questions that only this Court can resolve. There can be no disputing the fact that the *Walz* decision is a landmark in the judicial development of Establishment Clause doctrine. However, it is equally clear that the District Court applied the *Walz* decision in a manner that emasculated the *Allen* test.[12]

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[12] The *Walz* case was decided by this Court exactly four weeks after the parties to this appeal filed their post-trial briefs with the District Court. The District Court decided this case exactly six weeks after *Walz* was decided without giving the parties an opportunity to brief or argue the relevance of *Walz* to this case.

The District Court's ruling that the Salary Supplement Act resulted in impermissible entanglements between government and religion was based in large part on the statute's regulatory scheme and the "ongoing administrative relationship between government and Catholic schools" created by that regulatory scheme. App. A, pp. 16a-17a. The District Court stressed in particular that, in determining whether a nonpublic school had the requisite per pupil expenditures for secular education, the Commissioner of Education might have to distinguish between spending for religious education and spending for secular education in those schools. However, an examination of the operation of the salary supplement program refutes the District Court's conclusion that excessive "entanglements" are a necessary effect of the statute. For example, during the first year of the statute's operation, no investigation of a nonpublic school's expenditures for secular and religious education was necessary, and the District Court recognized that, for the great majority of nonpublic schools benefiting from the statute, no such investigation would ever be necessary. App. A, p. 5a, n. 6.

A more serious consequence of the District Court's application of *Walz* is its suggestion that the mere existence of an administrative relationship between a governmental agency and a religiously affiliated school will invalidate a public aid program. The authority of state officials under the Salary Supplement Act is limited to assuring that the legislature's secular purpose will be implemented. Since *Allen* permits the state to subsidize the secular educational functions performed by parochial schools, it is wholly anomalous to hold that a regulatory scheme carefully tailored to

assure that proper use of public funds renders the aid program unconstitutional within the meaning of the *Walz* decision. Yet the District Court has reached just such an anomalous result in this case.

CONCLUSION

The federal questions presented by this appeal are substantial and are directly relevant to the constitutional questions presented by the appeals in *Lemon* v. *Kurtzman, supra,* and *Tilton* v. *Richardson, supra.* It is therefore respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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August, 1970

APPENDIX

APPENDIX A

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

Civil Action No. 4239

JOAN DICENSO, ET AL., *Plaintiffs,*

v.

WILLIAM P. ROBINSON, JR., ET AL., *Defendants,*

and

JOHN R. EARLEY, ET AL., *Intervenor-Defendants.*

Opinion

June 15, 1970

Before FRANK M. COFFIN, *Circuit Judge:* RAYMOND J. PETTINE, *District Judge—Rhode Island:* HUGH H. BOWNES, *District Judge—New Hampshire.*

COFFIN, Circuit Judge. Rhode Island's Salary Supplement Act, R. I. Public Laws c. 246 (1969), provides for the payment of state funds to teachers of secular subjects in non-public elementary schools. At present the sole beneficiaries of this statute are teachers in Roman Catholic schools. This suit seeks a declaration that the Act violates the Establishment and Free Exercise Clauses of the First Amendment and an injunction against its continued operation.

Plaintiffs are citizens and taxpayers of the state of Rhode Island. The named defendants include Rhode Island's Commissioner of Education, the state Treasurer, and the state Controller, all of whom are involved in the administration of the Act. In addition, a couple with children in parochial schools and several teachers eligible for aid under the statute have been permitted to intervene

under Rule 24(b), Fed. R. Civ. P. Jurisdiction is based on 28 U.S.C. § 1343(3). Since the complaint seeks to enjoin a state law as repugnant to the Constitution, this three-judge court has been convened pursuant to 28 U.S.C. §§ 2281, 2284.

The complaint alleges in substance that Catholic schools are the primary beneficiaries of the Act, that the goal of these schools is the propagation of the Catholic faith, and that the statute therefore has as its purpose and primary effect the advancement of religion. Plaintiffs also claim that the statute constitutes compulsory taxation in aid of religion and thus violates the Free Exercise Clause. In their answers, defendants and defendant-intervenors have stressed that the Act aids teachers, not schools, and have denied plaintiffs' conclusion concerning the purpose and effect of the Act. Defendant-intervenors have also alleged that the injunctive relief sought by plaintiffs would infringe the free exercise of religion of those whose children attend parochial schools.[1]

The case is now before us for final decision on the merits of plaintiffs' and intervenors' constitutional claims. We have held a hearing, at which we received depositions and

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[1] Defendants also filed a motion to dismiss on the grounds that plaintiffs lacked standing. This objection we find to be without merit. The standing of taxpayers to challenge state expenditures which infringe the Establishment Clause has long been settled. *Doremus* v. *Board of Education*, 342 U.S. 429 (1952). The more recent two step analysis suggested in *Association of Data Processing Service Organizations Inc.* v. *Camp*, 397 U.S. 150 (1970), produces the same result. Plaintiffs allege that their tax dollars are being misspent, thus establishing injury in fact. It is also clear that the Establishment Clause was intended to limit the use of public funds in support of religious institutions. *Flast* v. *Cohen*, 392 U.S. 83, 103-104 (1968); *see Everson* v. *Board of Education*, 330 U.S. 1, 11-13 (1947). Thus the interest asserted by plaintiffs is within the zone protected by the First Amendment. *Accord*, *Lemon* v. *Kurtzman*, 310 F. Supp. 35 (E.D. Pa., 1969), *prob. juris. noted*, 38 U.S.L.W. 3401 (U.S. April 21, 1970).

documentary evidence, and heard testimony from the Superintendent of Schools for the Archdiocese of Providence, an Associate Commissioner of Education for the state of Rhode Island, and several teachers eligible for aid under the statute. On the basis of this record, we make the following findings of fact and reach the following conclusions of law in compliance with Rule 52(a), Fed. R. Civ. P.[2]

I. *Findings of Fact*

A. *The Statutory Scheme*

The Salary Supplement Act opens with a statement that its general purpose is to implement the established state policy of providing "a quality education for all Rhode Island youth".[3] This declaration is followed by specific legislative findings: that non-public elementary schools enroll 45,000 students, or 25 per cent of Rhode Island's elementary school children; that because of the numbers enrolled, these schools are vital to Rhode Island's educational effort; and that the rising cost of teachers' salaries makes it increasingly difficult for these schools to maintain their traditional quality. The specific purpose of the Act is, in the language of the statute, "to assist nonpublic schools to provide salary scales which will enable them to retain and obtain teaching personnel who meet recognized standards of quality." To accomplish this objective, the

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[2] In making these findings, we have taken into consideration the evidentiary objections of defendants and intervenors. We have declined to consider evidence concerning the activities of proponents of the Salary Supplement Act for reasons discussed *infra* p. 15 and have also ignored sociological evidence introduced in plaintiffs' post-trial memorandum. We reject, however, intervenors' view that the only relevant evidence concerned the activity subsidized, i.e., secular teaching in parochial schools. Such a narrow view of relevance in effect prejudges the central legal issues of the case.

[3] *Compare* R. I. Const. Art. XII, § 1; R. I. Gen. Laws § 16-7-15 (Supp. 1967).

legislature appropriated $375,000 to pay up to 15 per cent of the salaries of teachers of secular subjects in non-public elementary schools. The Act defines "non-public" school to mean a non-profit school whose average per pupil expenditure on secular education does not exceed the average for the state's public schools during a specified period. To qualify for aid, a teacher must have a teaching certificate, must teach a course similar to those offered in Rhode Island's public schools using text books approved for public school use,[4] and must agree not to teach a class in religion.

Regulations implementing the Act call for semi-annual payments to eligible teachers in February and June.[5] Applicants must sign a "Statement of Eligibility" promising not to teach a course in religion and to use only teaching materials employed in the state's public schools. The Commissioner of Education also requires non-public schools to submit data concerning enrollments and total expenditures. If this data indicates a per-pupil expenditure in excess of the statutory norm, an agent of the Commissioner must examine the books of the school in question in order to determine how much of its spending was attributable to secular education and how much to religious.

To date, this final breakdown into secular and religious expenses has proved necessary in only one case. Only two non-public schools have reported expenditures in excess

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[4] *See* R. I. Gen. Laws §§ 16-23-2 and 16-1-9 (Supp. 1967), which authorize local school committees to furnish parochial school children with any mathematics, science or foreign language textbook which appears on the Commissioner of Education's list of books approved for public school use.

[5] The first payment scheduled for February 1970 was delayed by a temporary restraining order entered by the single judge to whom the complaint was originally submitted. The restraining order was allowed to lapse by agreement of the parties, and plaintiffs have waived their prayer for a preliminary injunction.

of the statutory norm, and teachers at one of these schools failed to apply for aid, thus obviating the need for further inquiry.[6] Approximately 250 teachers have applied for aid. It is undisputed that all of these applicants are employed by Roman Catholic schools.

B. *Nature of the Crisis Leading to the Statute*

The evidence introduced at trial fully corroborates the legislature's finding of a financial crisis in non-public education, but indicates that the crisis is largely confined to Rhode Island's Catholic schools. Approximately 95 per cent of the elementary school children attending non-public schools are enrolled in Roman Catholic elementary schools. The financial crisis in these schools stems from the rapidly changing composition of their faculties. As recently as ten years ago, the Archdiocese of Providence relied almost exclusively on nuns to staff its school system. Lay teachers filled only 4 or 5 per cent of the system's 1200 teaching positions. By 1969, lay teachers constituted one third of the teaching force. In the academic year 1970-1971, the great majority of parishes will require at least one additional lay teacher, with some needing two or three more. This precipitous increase in lay personnel—an increase which is expected to continue—has placed a double burden on the parish budgets which finance almost all of the 98 elementary schools. Each shift from a teaching sister to a lay teacher represents a threefold increase in salary expense (i.e., a shift from approximately $1800 to $5500 at present levels). Moreover, the increasing salary levels in public schools make the task of recruiting lay teachers annually more expensive.

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[6] It is worthy of note that these schools were the only non-Catholic schools to report their expenditures to the Commissioner. As long as Catholic schools rely heavily on nuns, their wage costs are likely to remain substantially below those of public schools, *see infra* p. 6, thus obviating the need to break down expenditures.

The Salary Supplement Act will not relieve the parishes or parents of their escalating burden, but will temporarily enable parochial schools to compete for qualified teachers. A comparison of past and predicted salary levels confirms the limited impact of the statute. In 1968-1969, a starting lay salary in the parochial schools was $5000 a year. In 1969-1970 the diocesan school system offered $6000, hoping that 15 per cent of this amount, or $900, would be paid by the state under the Supplement Act. In the meantime, however, the standard beginning salary for public elementary school teachers in Providence and elsewhere has increased from $6000 to $7000. Even assuming, as does the Superintendent of the diocesan school system, that the parochial schools can compete effectively for teachers if they come within $500 of public school salaries, the diocese must offer a starting salary of $6500 in 1970, of which $975 would be paid by the state and $5525 would be paid by the parish—an increase of ten per cent over the $5000 parish expenditure pre-1969.

The financial implications for both the parishes and the state are clear. Even to continue to subsidize the salaries of the present teacher-recipients at the present percentage figure will cost both the state and the parishes substantially more during the coming school years. But already the Superintendent of the diocesan school system has informed elementary school principles that he expects the present ratio of two sisters to one lay teacher to give way to a one to one ratio in the near future. Moreover, the Superintendent acknowledged at trial that almost all of the teaching staff might be lay persons within five years. Since, as we have seen, the substitution of a lay for a religious teacher means, even at present rates, a threefold increase in salary cost, it is obvious not only that the parochial schools face a monumental and deepening financial crisis but also that the objective and rationale of the Salary Supplement Act—to enable non-public schools to compete effectively for qualified teachers—will inescapably require

substantially greater appropriations subsidizing substantially greater percentages of the salaries of lay teachers.

C. The Parochial School System

At trial, the parties went beyond the immediate financial crisis in parochial schools to explore the operations of the diocesan school system as a whole. Plaintiffs' evidence was designed to show the close financial and pedagogical nexus between Church and school. Intervenors' testimony explored the teaching of secular subjects in these schools. From this evidence, the following picture emerges.

Rhode Island's Catholic elementary schools are under the general supervision of the Bishop of Providence, and of his appointed representative, the Diocesan Superintendent of Schools. The financing of these schools varies: in some, substantial tuition is charged covering up to 40 per cent of school costs; others charge only a nominal fee and rely on general parish revenues to make up the balance. In most cases, however, the parish assumes the ultimate financial responsibility for the school, and the pastor assumes the ultimate responsibility for the allocation of parish funds. School principals are, with two exceptions, nuns appointed either by the Superintendent or by the Mother Provincial of the order staffing the school. Lay teachers are first interviewed by the Superintendent's office, then by the school principal, with the contract being signed by the pastor of the parish. The Diocese sets minimum salary standards for both lay teachers and nuns, but some discretion is left to the individual pastor in negotiating actual salary levels.

The ground rules for school principals are set forth in a "Handbook of School Regulations", having "the force of synodal law in the diocese." The impression of tidy central management which the Handbook conveys was somewhat dispelled at trial when the Superintendent testified that the Handbook had been frequently superseded either by in-

formal directive or by common practice. Testimony also indicated that individual principals, whether by design or oversight, felt free to make minor modifications in diocesan programs to fit the particular needs of the school.

The main thrust of the Handbook, however, remains clear. The keynote of education in a parochial school is perhaps best reflected in the Handbook's remarks about the importance of a teacher: "The prime factor for the success or failure of the school is the spirit and personality, as well as the professional competence, of the teacher. . . ." Consistent with this view is the Handbook's view of the scope of religious activities: "Religious formation is not confined to formal courses; nor is it restricted to a single subject area." Teachers are further advised by the Handbook to try to stimulate interest in pursuing religious vocations and in missionary work.

This concern for religious values does not necessarily affect the content of secular subjects in diocesan schools. On the contrary, several teachers testified at trial that they did not inject religion into their secular classes, and one teacher deposed that he taught exactly as he had while employed in a public school. This testimony gains added credibility from the fact that several of the teachers were non-Catholics. Moreover, because of the restrictions of Rhode Island's textbook loan law, R.I. Gen Laws §§ 16-23-2, 16-1-9 (Supp. 1967), and the explicit requirement of the Salary Supplement Act, teaching materials used by applicants for aid must be approved for use in the public schools.

Nevertheless, the diocesan schools do possess a number of distinctively religious attributes which distinguish them from public schools. Each parochial school is in close proximity to the parish church, allowing a convenient access for Mass or other religious exercises. The exterior of the school often has an identifying cross; each classroom contains a crucifix and school interiors generally exhibit re-

ligious paintings and statuary. Classes each day begin with a prayer; some schools schedule additional times for prayer. Roughly thirty minutes a day or one hundred fifty minutes a week are devoted to religious instruction. Assembly programs sometimes include a speaker on religious vocations or missionary activity, and some extra-curricular activities, such as altar or choir boy training and missions programs, are religiously oriented. Students and faculty participate in a yearly retreat and all teachers participate in a two day annual meeting of the Catholic Teachers Institute in which the teaching of religion is occasionally discussed. Occasional guidance counselling, including religious counselling, takes place at the elementary level.

In addition to these factors, the Church gains special advantage from a curriculum which contains both religious and secular subjects. When religion is part of the school day, children can be instructed in their faith more frequently, with less absenteeism, and with greater attention to the religious development of each child. Moreover, religious instruction can be staggered throughout the day to utilize more effectively the limited number of qualified teachers of religion. Finally, we note that the presence of dedicated sisters, though diminishing in numbers, provides an atmosphere where religious instruction and religious vocations seem natural parts of everyday life. Indeed, concern for this intangible "religious atmosphere" has led the Superintendent to decide tentatively to attempt to maintain a one sister to one lay teacher ratio in most of the diocesan schools rather than permitting some to be staffed predominately by lay teachers. To go below this norm would, the Superintendent feared, dilute the Catholic atmosphere of the parochial schools.

Implicit in these findings, we think, is the further finding that the diocesan school system is an integral part of the religious mission of the Catholic Church. It is not that religious doctrine overtly intrudes into all instruction.

Rather the combined conveniences of ready access to church and pastor, homogeneous student body, and ability to schedule throughout the day a blend of secular and religious activities makes the parochial school a powerful vehicle for transmitting the Catholic faith to the next generation. It also seems clear to us that this essentially religious enterprise cannot succeed without good teaching in secular subjects. If the quality of teaching falls too low, then not only will Catholic parents be reluctant to enroll their children, but the parochial schools would also run afoul of Rhode Island's education laws.[7] Good secular teaching is as essential to the religious mission of the parochial schools as a roof for the school or desks for the classrooms.

These determinations point to two ultimate facts. On the one hand, we find that the statute will have the significant if temporary secular effect of aiding the quality of secular education in Rhode Island's Roman Catholic elementary schools. On the other hand, we think it equally clear that the Act gives significant aid to a religious enterprise.

II. *Conclusions of Law*

A. *Plaintiffs' First Amendment Claims*

With these findings in mind, we turn to the central legal issue of the case, whether Rhode Island's Salary Supplement Act violates the First Amendment's provision that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof", as applied to the states through the Fourteenth Amendment. *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Everson* v. *Board of Education*, *supra* n. 1.

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[7] R. I. Gen. Laws § 16-19-2 sets standards for private schools and requires them to obtain the approval of the local school committee to satisfy compulsory attendance laws. *See also* R. I. Gen. Laws § 16-22-2.

Plaintiffs' free exercise claim need not long detain us. In their complaint, plaintiffs alleged that the statute infringed on the free exercise of their religion by forcing them to pay taxes for religious purposes. But plaintiffs offered no testimony concerning their personal religious beliefs and practices, or lack thereof. Thus they have failed to introduce the kind of particularized evidence necessary "to show the coercive effect of the enactment as it operates against [them] in the practice of [their] religion." *Abington School District* v. *Schempp*, 374 U.S. 203, 223 (1963).

The heart of plaintiffs' case lies in their claim that the Act violates the Establishment Clause. Much of the dispute at trial centered on the appropriate standard for gauging this claim. As of the date of argument in this case, there were three dominant precedents from which the parties drew sustenance. The first was *Everson*, in which the Court upheld a New Jersey statute which permitted reimbursement to parents for bus fares of children attending both public and parochial schools. The second was *Schempp*, proscribing prayers in public schools. The third was *Board of Education* v. *Allen*, 392 U.S. 236 (1968), which upheld a New York law requiring local school boards to loan textbooks to children attending parochial schools.

Plaintiffs have mounted a preliminary attack based on a statement in *Everson* that, "No tax in any amount, large or small, can be levied to support any religious activities or institutions." 330 U.S. at 16. Since the Act appropriates tax monies for employees of religious institutions, plaintiffs maintain, it is clearly unconstitutional. Whatever the continued vitality of the *Everson* test, however, we are satisfied that it cannot be applied in such a literal manner. Although in both *Everson* and *Allen*, tax funds were used to support religious institutions, in both the aid was sustained. Plaintiffs distinguish these cases on the grounds that the cost of bus fares in *Everson* and textbooks in *Allen* was originally borne by the parents rather than the schools.

But assuming that state subsidies of buses or books otherwise pass constitutional muster, we find it difficult to believe that these laws would fail because prior to enactment parents bore the costs indirectly, in the form of higher school bills, rather than directly. *Accord, Lemon* v. *Kurtzman*, 310 F. Supp. at 47-48; *Tilton* v. *Finch*, — F. Supp. — (slip opinion at 11-12) (D. Conn. March 19, 1970).

Perhaps recognizing the shortcomings of the *Everson* formulation, both plaintiffs and defendants have focused their argument on the purpose and effect test relied on in *Allen*, 392 U.S. at 243, and first enunciated in *Schempp*:

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of the legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. . . ." 373 U.S. at 222.

The first part of this test—determining the statute's purpose—presents little difficulty. The Salary Supplement Act, in our opinion, was not intended to advance or interfere with religion. The statute itself recites that its purpose is "to provide a quality education for all Rhode Island youth, those in public and non-public schools alike." Certainly, the quality of education in non-public schools is a legitimate legislative concern. *Board of Education* v. *Allen*, 392 U.S. at 245-247. We find nothing in the history and structure of the Act which suggests that the legislative purpose was other than as declared.

In reaching this result, we necessarily reject plaintiffs' attempt to divine the "true intent" of the legislature by inspecting the activities of lobbyists. As Mr. Justice Frankfurter observed in *McGowan* v. *Maryland*, 366 U.S. 420, 469

(1961), "[T]he private and unformulated influences which may work upon legislation are not open to judicial probing." *See United States* v. *O'Brien*, 391 U.S. 367, 383-385 (1968). Nor do we think that the legislature revealed a forbidden motive when it stated that the proposed legislation was designed "to assist non-public *schools* to provide salary scales which will enable them to retain and obtain teaching personnel who meet recognized standards of quality." (Emphasis added.) Phrasing the test in terms of schools instead of students does not, we think, obscure the legislature's legitimate concern for the quality of education afforded to Rhode Island youth. Finally, while the restriction of aid to schools whose per pupil expenditure does not exceed that of the public schools may result in excluding, for the most part, private but non-parochial schools from the scope of the statute, this provision also serves the legitimate secular purpose of saving state funds by eliminating schools which can well afford qualified teachers.[8]

The second part of the *Schempp* test—determining the statute's "primary effect"—presents a more difficult problem of both definition and application. Plaintiffs have argued that "primary" means "essential" or "fundamental". Defendants and intervenors have taken a more literal position, claiming that "primary" means "first in order of importance". The problem of definition is critical in this case because, as we have noted in our findings, the Act has two significant effects: on the one hand, it aids the quality of secular education; on the other, it provides support to a religious enterprise. Judicial efforts to decide which of these effects is "*the* primary effect", as *Schempp* seems to require, are likely to be no more satis-

[8] This aspect of the statute comes close to being a "religious gerrymander". Harlan, J. concurring in *Walz* v. *Tax Commission*, 38 U.S.L.W. at 4356. Nevertheless, the standard chosen is religiously neutral and almost any criteria based on financial need would produce the same result.

factory than efforts to rank the legs of a table in order of importance.

Intervenors, in an effort to give shape to the *Schempp* test, have urged us to focus solely on the activity subsidized in judging effect. In other words, intervenors propose that we examine only the activities of the teachers receiving aid and ignore the religious nature of the schools in which they teach. Such a narrow perspective, however, strikes us as unrealistic when examining direct financial aid to denominational schools. The expenses of a religious institution may be apportioned in a variety of ways among its "secular" and "religious" activities. Under plaintiffs' proposed test, sophisticated bookkeeping could pave the way for almost total subsidy of a religious institution by assigning the bulk of the institution's expenses to "secular" activities.[9] Equally important, government aid to purely secular activity may nevertheless involve the state so deeply in the workings of religious institutions "as to give rise to divisive influences and inhibitions of freedom." *Abington School District* v. *Schempp,* 374 U.S. at 307 (Goldberg, J. concurring). Such embroilments would escape the narrow focus of intervenors' test.

These deficiencies in the *Schempp* test were, we think, recognized in the recent case of *Walz* v. *Tax Commission of New York City,* 38 U.S.L.W. 4347 (U.S. May 4, 1970),

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[9] Our brother in dissent accepts intervenors' narrow view of the *Allen* test. However, in *Allen* there was no record on which to predicate a finding that the effect of the statute would differ from its declared purpose. Moreover, as our findings indicate, the "religious enterprise" assisted in this case is not the discrete teaching of religion, but the maintenance of an educational environment within which religious instruction takes place in varied ways. *McCollum* v. *Board of Education,* 333 U.S. 203 (1948), suggests to us that such an environment may not be maintained at public expense. Finally, we do not intend our reference to "sophisticated bookkeeping" to imply only sham allocations of expenditures; an accounting system might honestly allocate only a small portion of the total costs of a parochial school to the religious function.

upholding New York's tax exemption for property used for religious purposes. The test as phrased by Chief Justice Burger is still two pronged:

> "Each value judgment under the Religion Clauses must . . . turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." 38 U.S.L.W. at 4348.

The Chief Justice's phrasing and application of the effect test, however, mark a significant refinement. Gone are the intimations of *Schempp* that the single predominant effect of a statute may be isolated by a process of deductive reasoning based on principle and precedent.[10] Instead, the Court focuses on whether the statute fosters "exclusive entanglement" between government and religious institutions. Such entanglement is variously characterized as "sponsorship", "interference", and a relationship generating "confrontation and conflicts". Most pertinently, in discussing the alternatives of taxing or exempting church property, the Chief Justice observes:

> "[T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards . . . ." 38 U.S.L.W. at 4350.

Walz thus makes it clear that the test of a statute's effect is not whether the secular result is more important than

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[10] Indeed, we note that neither the majority nor the concurring opinions rely on the *Schempp* formulation.

the religious result, nor whether the activity aided is in form secular, but whether the degree of entanglement required by the statute is likely to promote the substantive evils against which the First Amendment guards.

When the effect of the Salary Supplement Act is judged by this standard, two significant dangers appear. First, the Act authorizes a subsidy which, unlike the exemptions involved in *Walz*, must be annually renewed. In a nation of many sects, the efforts to obtain government financing of those few denominations which support school systems will inevitably excite bitter controversy. In some jurisdictions where the majority belong to a single denomination, state subsidies of sectarian schools may amount to an establishment in the classic sense. In Rhode Island itself, sectarian controversy is likely to be exacerbated by the continuing financial crisis in its parochial schools, and by the open-ended nature of the Act. If this grant is constitutional, we would find it difficult to distinguish a 50 or 100 per cent subsidy of teachers' salaries, or a percentage subsidy of the total cost of "secular" education such as Rhode Island already provides its public schools.[11]

On the other side of the coin, significant state subsidies will inevitably produce significant state limitations on the freedom of denominational schools. A direct subsidy of the educational process such as this statute provides requires greater administrative involvement between church and state than the payment of transportation costs involved in *Everson* or the loaning of textbooks in *Allen*. In *Everson*, the local school committee simply reimbursed the parents of parochial school children for bus fares. In *Allen* public school officials—in theory, at least—performed their customary task of determining which books were suit-

[11] Rhode Island once provided a flat grant for public school teachers' salaries, R. I. Gen. Laws § 16-6-3 *et seq.* (1956), but this system has now been replaced by a percentage subsidy of the cost of education. R. I. Gen. Laws § 16-7-15 *et seq.* (Supp. 1967).

able for public school use. *Compare* R. I. Gen. Laws § 16-1-9 (Supp. 1967).[12] Under this statute, by contrast, the Commissioner of Education must monitor parochial school expenditures and in close cases determine which spending is "religious" and which "secular". This ongoing administrative relationship between government and the Catholic schools creates the possibility of legal disputes over the "secular-religious" distinction, *cf. Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hill Memorial Presbyterian Church,* 393 U.S. 440 (1969), and may well influence the allocation of church resources as the parishes tailor their spending to meet the Commissioner's criteria.

Equally important, the kind of involvement which this statute promotes may significantly limit the internal freedom of parochial schools. Already the Act has restricted the role of teachers. The evidence before us indicates that some otherwise qualified teachers have stopped teaching courses in religion in order to qualify for aid under the Act. One teacher, in fact, testified that he no longer prays with his class lest he endanger his subsidy. Similar restrictions may be expected on the content of courses. In this very case we have been forced to inquire into the teaching in Rhode Island's Catholic schools in order to determine whether religion "permeates" the teaching of secular subjects. *See also Board of Education* v. *Allen,* 392 U.S. at 248. Surely such inquiries represent a substantial limitation on the freedom of parochial schools to set their own curriculum. Moreover, as Judge Hastie pointed out dissenting in *Lemon* v. *Kurtzman,* 310 F. Supp. at 52, private conduct which is heavily subsidized by the state may be viewed as state action and subjected to the same stand-

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[12] *But see* Note, *Sectarian Books, the Supreme Court and the Establishment Clause,* 79 Yale L. J. 111 (1969), which reviews the contents of the books actually supplied under the New York law and concludes that many were infused with a sectarian viewpoint.

ards of impartiality which we demand of the government. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *cf. Evans* v. *Newton*, 382 U.S. 296 (1966).[13] Applying these standards to parochial schools might well restrict their ability to discriminate in admissions policies, *cf. Pennsylvania* v. *Board of Directors of City Trusts*, 353 U.S. 230 (1957), and in the hiring and firing of teachers, *cf. Keefe* v. *Geanakos*, 418 F.2d 359 (1st Cir. 1969).[14] At some point the school becomes "public" for more purposes than the Church could wish. At that point, the Church may justifiably feel that its victory on the Establishment Clause has meant abandonment of the Free Exercise Clause.

In short, we see as the necessary effects of the kind of legislation involved here not only substantial support for a religious enterprise, but also the kind of reciprocal embroilments of government and religion which the First Amendment was meant to avoid. We therefore hold that

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[13] We note the increasing resort to the federal courts to rectify alleged wrongs committed by school authorities acting under the color of state law. *E.g., Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969) (peaceful protest by high school students); *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961) (procedural due process for students); *Richards* v. *Thurston*, — F.2d — (1st Cir. April 28, 1970) (length of student's hair).

[14] The regulations of Rhode Island's Commissioner of Education require schools whose teachers apply for aid to comply with Title VI of the Civil Rights Act of 1964, surely the minimum we may expect of any organization receiving significant public support. More difficult problems loom down the road. For example, one pastor deposed that he would refuse to hire a teacher who had been divorced and remarried. The religious discrimination which sectarian schools must of necessity practice may also be used to cloak other, less desirable forms of discrimination. *See, e.g.*, W. Morris, *Yazoo . . . Notes on Survival*, Harper's Magazine 43, 53 (June, 1970). Whatever their solution, these problems indicate that we would have to rethink much of our law, especially the law of equal protection, in order to accommodate an institution which receives significant state aid and yet discriminates on principle.

the Salary Supplement Act results in excessive government entanglement with religion and thus violates the Establishment Clause of the First Amendment.[15] *Accord, Opinion of the Justices,* 261 A.2d 58 (Me. Jan. 15, 1970).

B. *Intervenors' First Amendment and Equal Protection Claims*

There remains for our consideration the equal protection claim of the teacher-intervenors and the free exercise claim of the parent-intervenors. The equal protection claim is the more elusive of the two. Teacher-intervenors apparently assume a Salary Supplement Act restricted by judicial decree to aiding teachers in non-public but secular schools. Such a statutory scheme, intervenors argue, would violate equal protection because it discriminates among teachers of secular subjects on an impermissible ground—i.e., religion. Their argument remains somewhat hypothetical since, as we have seen, the only applicants for aid have been parochial school teachers. Intervenors are, in other words, complaining of the abstract possibility of discrimination rather than the thing itself. Moreover, intervenors' hypothetical scheme would not discriminate on the basis of the teachers' personal beliefs—surely a suspect classification—but on the basis of the institutions which employ them. This distinction between secular institutions which are eligible for subsidy and religious institutions which are not seems to us commanded by the Establishment Clause. Thus,

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[15] While we conclude that Rhode Island's statute is unconstitutional, we do not wish to be read as condemning aid in any form to institutions affiliated with religion. We do not, for example, disagree with the result in *Tilton* v. *Finch, supra,* which upheld a federal enactment subsidizing secular facilities at private colleges, including church-related colleges. The degree of institutional involvement required by the federal program was episodic and relatively slight. Moreover, denominational colleges do not have the same close financial, legal, and pedagogical relationship to the Church as do parochial schools.

even though religion in general may be a suspect classification, the mandate of the Establishment Clause provides an overriding justification in this case. *Cf. Korematsu* v. *United States*, 323 U.S. 214, 216 (1944); *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967).

The parent-intervenors present a more plausible claim, based on the Free Exercise Clause. Their complaint rests on the conviction that children take their values to a large extent from their school environment; a school without religion conveys to the child the notion that religion is unimportant. Because of this conviction, parent-intervenors feel in conscience bound to send their children to parochial schools which teach both secular subjects and religion. If, however, the quality of secular education falls too low in parochial schools, parent-intervenors may well be forced to ignore the dictates of conscience by sending their children to public schools. To avoid this result, intervenors argue that the free exercise benefits which flow from aid to parochial education should prevail over the Establishment Clause values protected by strict separation, citing in support of their argument *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

While sympathetic to intervenors' dilemma, we note that it stems primarily from their personal evaluation of public school education. We reject the notion that the Free Exercise Clause demands affirmative state action to accommodate such personal evaluations when society at large has accepted the premise that religious and secular education can be successfully separated. *See* Freund, *Public Aid to Parochial Schools*, 82 Harv. L. Rev. 1680, 1686-1687 (1969). Certainly it would be anomalous if the First Amendment required the state to exclude religion from the public schools but at the same time to support an entire separate school system in order to facilitate the teaching of religion. Such a result is not compelled by *Sherbert* v. *Verner*, *supra*, which required a minor change in a welfare program to

accommodate sabbatarians. The Court was careful to note that such minor accommodation did not entail the kind of involvement of religious and secular institutions forbidden by the Establishment Clause. 374 U.S. at 409. The Court also noted that some burdens on the free exercise of religion could be justified by a compelling state interest requiring uniformity of regulation. 374 U.S. at 406-409. Our case falls within both these exceptions. Not only does the Salary Supplement Act embroil religious and secular institutions, but the Establishment Clause values can be preserved only by denial of direct subsidies to parochial schools. We therefore reject the free exercise claim of parent-intervenors.

III. *Conclusion*

Plaintiffs are entitled to a declaratory judgment that R. I. Public Laws c. 246 (1969) violates the First Amendment of the United States Constitution insofar as it authorizes aid to teachers employed by denominational schools, and to an injunction forbidding defendants and their agents from making disbursements to such teachers.

FRANK M. COFFIN
Frank M. Coffin
U. S. Circuit Judge

HUGH H. BOWNES
Hugh H. Bownes
U. S. District Judge

Dated at Providence, Rhode Island 15th day of June 1970

PETTINE, District Judge—concurring in result, concurring in part and dissenting in part with the Opinion of the Court.

The majority decision holds the Salary Supplement Act unconstitutional for two reasons: (1) its effect is substantially to support a religious enterprise; (2) its operation involves those "reciprocal embroilments of government and religion which the First Amendment was meant to avoid." I concur in the holding of unconstitutionality for the latter reason. However, my disagreement with the former reason requires my separate concurrence.

The Salary Supplement Act does not substantially support a religious enterprise; rather it supports a most important facet of the educational process in modern America, the teaching of all that knowledge presently appropriate for learning, exclusive of religion. That a distinction between the teaching of religion and non-religious subject matter in sectarian schools may be maintained for Establishment Clause purposes seems clear to me from the decision of the Supreme Court in *Board of Education* v. *Allen*, 392 U.S. 236 (1968). I read *Allen* to invite the inquiry whether the state program under scrutiny has as its effect the advancement of a religion. In answering that inquiry it cannot be presumed that secular aspects of the educational process are permeated by religious values emanating from the climate of the educational environment. Only proof will establish that subsidization of an educational enterprise is subsidization of a "religious enterprise." In the instant case not only is the record barren of any proof that the teaching of secular subject matter is a "religious enterprise," but also there is unanimous unrebutted testimony from several teachers of secular subjects in Roman Catholic schools that religion does not enter into their teaching processes.

I cannot accept the majority's proposal that exclusive focus on the educational function sought to be subsidized is

too narrow a standard because "sophisticated bookkeeping could pave the way for almost total subsidy of a religious institution by assigning the bulk of the institution's expenses to 'secular' activities." Such reasoning equates the legal and bookkeeping definitions of "secular" and "religious." The law is equipped to distinguish bookkeeping entries from legally distinct entities. The secular-religious distinction is fundamental; it will take more than accounting machinations to elude it.

The majority's rejection of the plaintiffs' heavy reliance on the principle stated in *Everson* v. *Board of Education*, 330 U.S. 1 at 16 (1947) that "(n)o tax in any amount, large or small, can be levied to support any religious activities or institutions," would seem to suggest that the *Allen* test is controlling. Paradoxically, however, the majority, in the face of *Allen* and without legal justification, conducts an extensive exploration of the evidence relating to the religious "atmosphere" in the Roman Catholic schools. In my view, *Allen* renders such an exploration irrelevant.

Finally, I would emphasize anew that I agree with the majority that *Walz* v. *Tax Commission of New York City*, — U.S. — (May 4, 1970) supplements *Allen*, to the extent that multiple effects of a statutory scheme may be considered, including its potential to create continuing controversies inimical to the values of the First Amendment. *Walz* does not, however, provide any precedent for the majority's assumption that support of the secular educational processes of sectarian schools constitutes "substantial support of a religious enterprise."

With all respect, I concur with the majority's result and only with that portion of the majority's opinion which elaborates the implications of the "excessive entanglements" aspect of the *Walz* decision for the instant case.

RAYMOND J. PETTINE
United States District Judge
June 15, 1970

APPENDIX B

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

Civil Action No. 4239

JOAN DICENSO, ET AL., *Plaintiffs*

v.

WILLIAM P. ROBINSON, JR., ET AL., *Defendants*

and

JOHN R. EARLEY, ET AL., *Intervenor-Defendants*

Judgment and Order

This action came on to be heard on a motion to dismiss and for trial on the merits before the Court, the Honorable Frank M. Coffin, Circuit Judge, the Honorable Raymond J. Pettine, District Judge for Rhode Island, and the Honorable Hugh H. Bownes, District Judge for New Hampshire, and after hearings thereon, arguments of counsel, the Court having rendered an opinion, dated June 15, 1970, setting forth its findings of fact and conclusions of law pursuant to Rule 52(a) of Fed.R.Civ.P., it is hereby

ORDERED AND ADJUDGED

1. The defendants' Motion to Dismiss is denied.

2. Rhode Island Public Law C. 246 (1969) is hereby declared to be unconstitutional in that it violates the First Amendment of the United States Constitution insofar as it authorizes aid to teachers employed by denominational schools.

3. The defendants and their agents are permanently enjoined from making any payments or disbursements under

Rhode Island Public Law C. 246 (1969) to teachers employed by denominational schools.

So Ordered,

RAYMOND J. PETTINE
Raymond J. Pettine
U.S.D.C.J.
June 17, 1970

NEAL MURPHY
Neal Murphy
Clerk of Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 69-4239

JOAN DICENSO, ET AL., *Plaintiffs*,

v.

WILLIAM P. ROBINSON, JR., ET AL., *Defendants*,

and

JOHN R. EARLEY, ET AL., *Intervenor-Defendants*.

Notice of Appeal to the Supreme Court of the United States

1. Notice is hereby given that the intervenor-defendants in the above-captioned matter do hereby appeal to the Supreme Court of the United States from the final judgment declaring Rhode Island's Salary Supplement Law unconstitutional and enjoining the operation of that statute, entered in this action on June 17, 1970. This appeal is taken pursuant to Title 28 of the United States Code, Section 1253.

2. Pursuant to the provisions of Rule 12(1) of the Rules of the Supreme Court of the United States, the Clerk is requested to certify and to transmit to the Supreme Court

of the United States the entire record of the proceedings herein.

Dated: June 26, 1970

/s/ Edward Bennett Williams
Edward Bennett Williams
1000 Hill Building
Washington, D. C. 20006

/s/ Jeremiah C. Collins
Jeremiah C. Collins
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APPENDIX D

R. I. Public Laws (1969)

CHAPTER 246.

AN ACT Providing for Salary Supplements to Non-public Schoolteachers and in Amendment of and in Addition to Title 16 of the General Laws Entitled "Education," as Amended.

It is enacted by the General Assembly as follows:

Section 1. Title 16 of the general laws entitled "Education," as amended, is hereby further amended by adding thereto the following chapter:

"CHAPTER 51

"Salary Supplements to Nonpublic Schoolteachers

"16-51-1. Legislative findings—Declaration of policy. —The general assembly being charged by the constitution of this state with the duty not only of promoting public schools but also adopting 'all means which they may deem necessary and proper to secure to the people the advantages and opportunities of education' makes the following findings: The public laws of 1960, chapter 27, declares: "It is the policy of the state of Rhode Island to provide a quality education for all Rhode Island youth." This statute implements that policy by providing that the state shall assist the cities and towns by paying part of the operating revenues for the public schools.

But there are in Rhode Island approximately 45,000 children attending nonpublic elementary schools. They constitute about 25% of the total school population at these age levels.

Because nonpublic schools enroll such a significant portion of the total school population of the state, the

state's policy of providing a quality education for all Rhode Island youth would be seriously impaired if the quality of education provided in said schools were to deteriorate.

Nonpublic schools are finding it increasingly difficult to maintain their traditional quality, due to rising costs. This is particularly serious with regard to the salaries of teachers; without adequate salary scales, no school can attract sufficient numbers of competent, dedicated teachers; and teachers are the prime factor in educational quality. These facts were recognized for the public schools in 1960, and dealt with by the passage of chapter 27 of the public laws of that year.

It is, therefore, the policy of the state of Rhode Island to provide a quality education for all Rhode Island youth, those in public and nonpublic schools alike; within the limitations imposed by the constitutions of the United States and of Rhode Island. In pursuance of said policy, in order to assist nonpublic schools to provide salary scales which will enable them to retain and obtain teaching personnel who meet recognized standards of quality, we hereby enact the following:

"16-51-2. Definitions.—As used in this chapter unless the context clearly indicates otherwise:

1. 'Nonpublic school' shall mean any school not operated for profit, other than a public school, within this state wherein a resident of this state may legally fulfill the compulsory school attendance requirements of the law, except such schools whose annual per student expenditure for secular education equals or exceeds the average annual per student expenditure in the public schools in the state at the same grade level in the second preceding fiscal year for school operations as determined by the commissioner of education.

2. 'Nonpublic school teacher' shall mean a teacher who teaches in a nonpublic school exclusively only those subjects required to be taught by state law, to the same extent as those subjects are taught in public schools, or which are provided in public schools throughout the state, or any other subjects that are taught in public schools.

"16-51-3. Eligibility for salary supplement.—Every nonpublic schoolteacher shall, upon his or her request, be paid by the state through the commissioner of education, a salary supplement in the amount fixed by law in such installments and at such intervals as shall be fixed by regulation promulgated by the commissioner of education. As a condition for the payment of such salary supplement the commissioner of education shall be satisfied that the teacher:

1. Is one who teaches in any grade from grade one through grade eight exclusively only those subjects required to be taught by state law to the same extent as those subjects are taught in public schools, or which are provided in public schools throughout the state, or any other subjects that are taught in public schools.

2. Has a teaching certificate issued by or under the authority of the state board of education in substantially the same manner that such certificates are issued to teachers in public schools.

3. Is receiving a salary which, including the salary supplement, meets the minimum salary standards for public schools required for eligibility under title 16, chapter 7 of the general laws of Rhode Island.

4. Is using only teaching materials which are used in the public schools of the state.

5. Is one who does not teach a course in religion and who signs a statement in which he or she promises not to teach a course in religion for so long as or dur-

ing such time as he or she receives any salary supplements provided for under the provisions of this chapter.

"16-51-4. Amount of supplement—How determined. —The amount of salary supplement to be paid to an eligible nonpublic schoolteacher shall be fifteen per cent (15%) of his or her current salary, which salary, including the salary supplement, is not in excess of the average maximum salary paid to public schoolteachers in this state as determined by the commissioner of education.

"16-51-5. Regulation by commissioner of education. —It shall be the duty of the commissioner of education to promulgate regulations for the purpose of carrying out the provisions of this chapter. Such regulations shall include rules and procedures for making payments of salary supplements to eligible teachers; said regulations however must provide that said payments be made by the state directly to the teacher and not through the agency of the nonpublic school in which the teacher is employed. Such regulations shall also insure that the teacher is receiving the minimum salary provided for in section 3 of this chapter, and to that end the financial records of the nonpublic school pertaining thereto shall be subject to auditing by the state department of education. Such regulations shall also insure that any nonpublic school, as that term is defined earlier in this chapter, which employs teachers who receive salary supplements as provided for in this chapter shall comply with the provisions contained in title VI of the civil rights act of 1964.

"16-51-6. Commission to study aid to nonpublic schools.—There is hereby created a commission to consist of nine (9) members to be appointed by the governor, one of whom shall be designated by the governor as chairman. The commission is to study and evaluate

state aid to nonpublic schools and is to report its findings and recommendations to the governor before January 1, 1970.

"16-51-7. Annual appropriations—Disbursements.—There is hereby appropriated out of any funds in the general treasury not otherwise appropriated the sum of three hundred seventy-five thousand dollars ($375,000.00), for the purpose of carrying out the provisions of this chapter; and the state controller is hereby authorized and directed to draw his orders upon the general treasurer for the payment of such sums, or so much thereof, as may from time to time be required within the amount appropriated, upon receipt by him of proper vouchers approved by the department of education.

"16-51-8. Severability.—If any clause, sentence, paragraph, or part of this chapter or the application thereof to any person or circumstance, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid or void, such judgment shall not affect, impair, or invalidate the remainder of this chapter or its application to other persons or circumstances.

"16-51-9. Liberal construction of act required.—This act shall be construed liberally in aid of its declared purposes."

Sec. 2. This act shall take effect on July 1, 1969.